Supreme Court, U.S.
FILED

No. 99-540

IN THE

Supreme Court of the United States

EDDIE BARTELS, *et al.*,

Petitioners,

v.

ALABAMA COMMERCIAL COLLEGE, INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT GEORGIA HIGHER EDUCATION ASSISTANCE CORPORATION'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Do federal laws concerning the federal Guaranteed Student Loan Program, 20 U.S.C. §§ 1071 *et seq.* and regulations adopted thereunder, preempt state agency law so as to allow borrowers to raise fraudulent misrepresentations by a school as a defense to repayment of a loan in circumstances where the school performs acts which are alleged to make the school the agent of the lenders?

PARTIES TO THE PROCEEDING

Petitioners are Eddie Bartels, Alfreda C. Bantum, Ruby C. Carr, Michele Cross, Sharon Days, Iris Hull, Mary L. Manley, Iris Miller, Linda Mosley, Alethia Pickney, Octavis Roberson, Leonie Smart, Shirley Travis, and Doretha Young, all of whom are former students of Riley Training Institute of Georgia. Petitioners were plaintiffs and appellants in the proceedings below. Defendants-appellees in the proceedings below are Secretary of Education Richard Riley, in his official capacity, the Georgia Higher Education Assistance Foundation, the Higher Education Assistance Foundation, and the Student Loan Marketing Association. Defendants-appellees are assignees of one or more student loans for petitioners.

Alabama Commercial College, the operator of the Riley Training Institute, was a defendant in the district court below but was not a party to the appeal. A default judgment was entered against Alabama Commercial College in the district court.

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STATUTORY PROVISIONS INVOLVED

The GHEAC Appendix sets forth the statutes and regulations cited by this Respondent as the basis for its contention that federal law preempts the common law of agency so as to impose liability on loan holders for the school's acts as alleged agent of the lenders. They are: 11th Cir. R. 36-2; 20 U.S.C. §§ 1078(a), (b), 1092(a), (b), 1094(a) (1990); 34 C.F.R. §§ 668.41(a), 668.43(a)-(c), 682.207(b), 682.603(a)-(e), and 682.604(c), (g) (1986).

STATEMENT OF THE CASE

This is a purported Class Action in the U.S. District Court for the Southern District of Georgia filed by thirteen Georgia residents (the "Petitioners") seeking to avoid their obligation under loans they received as participants in the Guaranteed Student Loan Program ("GSLP or GLS program"). The Petitioners claimed to have been enrolled at Alabama Commercial College, Inc. d/b/a Riley Training Institute of Savannah, Waycross and Brunswick (the "School") between 1988 and 1991. Named as defendants were the school (alleged to have failed to provide a quality education and to have failed to fulfill a promise of post-education employment); the Secretary of The U.S. Department of Education (allegedly responsible for implementing and overseeing the GSL program) and, the Student Loan Marketing Association (allegedly the holder of a number of guaranteed loans). Also named were two organizations – Higher Education Assistance Corporation and this Respondent, the Georgia Higher Education Assistance Corporation ("GHEAC") – which allegedly guaranteed a substantial number of student loans obtained by the Petitioners, and which were alleged to be the assignees of a substantial number of such loans. The banks which

actually made the loans to the Petitioners were not named as defendants (the defendants other than the school are hereinafter sometimes referred to as the "Nonschool Defendants").

The Petitioners attempted in the courts below to impose vicarious liability on the Nonschool Defendants for fraud and breach of contract under state law on the basis of the relationship which is alleged to have existed among Petitioners, the School, and the non-party lender banks. The district court dismissed the Petitioners' claims in an order reported at *Bartels v. Alabama Commercial College, Inc.*, 918 F. Supp. 1565 (S.D. Ga. 1995).

The Court of Appeals affirmed the dismissal in an unpublished order entered June 29, 1999. In pertinent part, the Court of Appeals affirmed dismissal of the claims against the Nonschool Defendants on the grounds that:

1. The district court did not err in determining that federal law preempted the Petitioners' claim under the Georgia law of agency.

2. The district court did no err in determining that the Petitioners had no rights under the FTC Holder Rule.

The Petitioners have filed their petition only with respect to the first ground for affirmance.

Petitioners' statement of the case completely fails to describe the pervasive and comprehensive federal scheme that governs the GSLP. The relationship between borrowers and lenders under the GSL program is highly regulated under the Higher Education Act (the "HEA"), 20 U.S.C. §§ 1001 *et seq.* and its implementing regulations. This regulatory scheme contemplates the fact that a student often has no

face-to-face contact with the lender whatsoever (*See* 54 Fed. Reg. 24114, 24125 (June 5, 1989) (comments of the Secretary of Education stating that lenders have no responsibility for in-person counseling of borrowers since they often have no face-to-face contact with borrowers).

Under the statute and implementing regulations, for example, a participating school is required to perform a number of tasks before a student may receive federally insured loans. The school must inform a student about financial aid. 20 U.S.C. §§ 1092(a), 1094(a)(9) (1990); 34 C.F.R. § 668.41 (1986). The school must explain to the student the requisite procedures and forms for applying for financial assistance. 20 U.S.C. § 1092(a)(1)(A)-(C) (1990); 34 C.F.R. § 668.43(b) (1986). The school must inform the student of his or her eligibility for financial aid. 20 U.S.C. §§ 1092(a), 1094(a)(9)(1990); 34 C.F.R. §§ 668.41(a), 668.43(b) (1986).

The school must perform certain administrative tasks necessary to process loan applications as well. These include completion of key parts of the borrower's loan application, such as those containing the amount of the loan recommended and the evaluation of the borrower's financial need. 20 U.S.C. § 1078(a)(2) (1990). The school must certify that the amount of the loan requested does not exceed the cost to the student of attending the school, in light of other resources available to the student, including a contribution from family resources and other financial aid. 20 U.S.C. § 1078(a)(2)(A)-(F) (1990); 34 C.F.R. § 682.603(a)-(e) (1986).

The school's involvement continues after the lender decides to make a GSL program loan. If the borrower is a student, his or her lender must disburse the loan proceeds

directly to the school. 20 U.S.C. § 1078(b)(1)(N) (1990); 34 C.F.R. § 682.207(b)(1)(v) (1986). The school is then required to process the proceeds. 34 C.F.R. § 682.604(c) (1986). The borrower must notify the institution, not the lender, of a change in address or a change in status that may affect the student's eligibility for the loan. 20 U.S.C. § 1078(b)(1)(P)(1990). Finally, the school is required to conduct exit counseling, to provide borrowers with information about their indebtedness, to review the repayment options and to suggest the debt management strategies. 20 U.S.C. § 1092(b) (1990); 34 C.F.R. § 682.604(g) (1986). In sum, the GSLP creates a long-distance lending program that is not like a conventional loan program.

REASONS FOR DENYING THE WRIT
SUMMARY OF ARGUMENT

The Petitioners have asked this Court to review an unpublished decision of the Eleventh Circuit in order to correct a purported conflict between that circuit and the Seventh Circuit. Under the rules of the Eleventh Circuit, its unpublished opinion has no precedential value. In addition, the purportedly conflicting decision of the Seventh Circuit was not a *decision* of that circuit at all, but merely *dicta* in a footnote that would conflict with the holding of that case only if it is interpreted as Petitioners erroneously interpret it.

The Petition should be denied for the additional reason that the decision of the court below was fully consistent with this Court's preemption jurisprudence and hence provides no ground for review by this Court.

Finally, contrary to the assertions in the Petition, the holding of the court below has no impact on the rights of borrowers under the current GSL program because of changes that occurred in that program in 1993.

Petitioners are asking this Court to review an order that has no bearing on current federal policy, has no precedential value, and does not conflict with the decision of any federal court of appeals. The Petition should therefore be denied.

I. Petitioners Have Failed To Establish That The Decision Of The Eleventh Circuit Conflicts With The Decision Of A United States Court Of Appeals Or A State Court Of Last Resort.

The Court should deny the Petition for Certiorari because no conflict exists among the circuits. Petitioners argue that the decision of the Court of Appeals in this case is in conflict with the Seventh Circuit's decision in *Veal v. First American Savings Bank*, 914 F.2d 909 (7th Cir. 1990). This suggestion is merely an attempt to manufacture a conflict where none exists. First, the decision of the Eleventh Circuit in this case does not even constitute binding precedent because the opinion was unpublished. 11th Cir. R. 36-2 states that unpublished opinions do not constitute binding precedent. Second, the decision in *Veal* that ostensibly creates the conflict was not a holding of the court: it was *dicta* in a footnote at the end of the opinion.

The *Veal* case began as a class action by students who had enrolled at a college that subsequently went bankrupt. The students in *Veal* sued the institutions through which they obtained their student loans although, as in the present case, the plaintiffs had failed to allege any fraudulent activity on the part of the Nonschool Defendants. The plaintiffs in *Veal* contended that the Nonschool Defendants were subject to school-related defenses because they were "closely connected by a mutually beneficial, continuous

business arrangement."[1] *Graham v. Security Savings and Loan*, 125 F.R.D. 687, 689 (N.D. Ind. 1989), *aff'd sub nom. Veal v. First American Savings Bank*, 914 F.2d 909 (7th Cir. 1990). The district court granted a motion to dismiss these claims.

On appeal, the Seventh Circuit Court of Appeals noted that the district court had been unimpressed by the students' "close connection" argument and had granted the defendants' motion to dismiss for failure to state a claim, and further noted that the district court had also found that the remedies under the HEA were limited to those enumerated in the statute *and* that the HEA preempted the students' state law remedies. *Veal*, 914 F.2d at 912. The Court of Appeals then summarized its holding as follows: "We agree that the students have failed to state a claim for relief against the defendants, and therefore affirm on this ground alone." 914 F.2d at 911. The court found the arguments that the students had advanced to bind the actions of the School to the

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[1] In support of their claim of a "close connection" between the lenders and the School, the *Veal* plaintiffs alleged as follows:

> Adelphi [the school] selected First American Savings as the Lender, used First American Savings' loan forms, and prearranged the loans for the students. Adelphi maintained and utilized preapproved promissory notes, usually preprinted with the name of First American Savings, and represented to the plaintiffs that all financial arrangements necessary to the loan approval had been prearranged with First American Savings. In short, Aldelphi dealt directly with the students and assumed responsibility to get all necessary forms to the lenders. First American Savings repeatedly and regularly made loans to finance the 'educational services' the Plaintiffs anticipated receiving from Adelphi.

Veal, 914 F.2d at 913, n.4.

nonschool defendants to be "unpersuasive" and accordingly ruled that "[b]ecause the students have failed to allege a connection between the fraudulent activity of Adelphi and the defendants, the district court correctly granted defendants' motion to dismiss for failure to state a claim." 914 F.2d at 914.

The sole basis for the Petitioner's assertion that the holding of *Veal* conflicts with the holding of the Eleventh Circuit here was *dicta* in a footnote at the end of the opinion. The Seventh Circuit observed that, although the students were without recourse in federal court, they were not without any remedy because--among other reasons--if sued by a lender in state court for collection of one of the loans, "each of them would be entitled to assert any defenses available under state law that are applicable to his or her particular loan." 914 F.2d at 914, n.7. The Seventh Circuit did not expressly indicate that the "close connection" or "agency" defense would be among the state law defenses which would be available to the borrowers in seeking to defeat a collection action.[2] Indeed, any inference to that effect would be inconsistent with the holding of the case, which rejected the "agency" or "close connection" theory. Most important, this *dictum* was not a *decision* of the court in conflict with the decision of the Eleventh Circuit at issue here, and hence does not provide a basis for granting Petitioners' petition.

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[2] Other available state law defenses might include payment, accord and satisfaction, release and the applicable statute of limitations.

II. The Rulings Below Do Not Conflict With Existing Supreme Court Precedents.

A. The Court of Appeals Correctly Held That the Higher Education Act Preempts the Petitioner's State Law Claims.

This Court also should deny the Petition for Certiorari because the Court of Appeals correctly held that the state law of agency is preempted by the Higher Education Act and the applicable regulations. This Court has held that federal law preempts state law if "the state law stands 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *California Federal Savings and Loan Association v. Guerra*, 479 U.S. 272, 280 (1987) (citations omitted). Federal regulations have no less preemptive effect than federal statutes. *Fidelity Federal Savings and Loan Association v. de la Cuesta*, 458 U.S. 141, 153 (1982). Where a state law provision "would do a serious blow to the Congressional scheme," the absence of express conflicting language in federal legislation does not preclude preemption. *U.S. v. Little Lake Misere Land Company, Inc.*, 412 U.S. 580, 597 (1982).

The only specific acts alleged in the Complaint as subjecting the Nonschool Defendants to school-related defenses are that (1) the school performed a number of actions which ostensibly are normally performed only by lenders before making loans,[3] and (2) the loan documents

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[3] Specifically, it is alleged, upon information and belief, that the school determined who received the loans and the amount of the loans; verified the identity of the borrower, assisted the borrower in completing the loan application forms, and prepared, presented and collected the documentation. (Record 61, Amended Complaint ¶ 103).

signed by the Petitioners were prepared and presented to them by representatives of the school, without the Petitioners having any direct contact with the lenders. (Record 61, Amended Complaint ¶ 104). Even when taken as true, however, these allegations are insufficient to make the Nonschool Defendants responsible for the School's misdeeds because the allegations in support of this claim describe activities which would be followed respectively by any school or lender in complying with the procedures required under the GSL program.

The GSLP is not a conventional loan program, where the borrower deals directly and primarily with his bank in the initiation of a loan. Rather, the GSLP is an entirely unconventional program, whose basic elements include the lender's extension of credit to a borrower he may never meet and a school that actively assists in facilitating the loan transaction. These are the elements which Petitioners assert as giving rise to "agency" liability under state law. However, these elements amount to nothing more than long-distance lending, which is integral to the operation of the GSLP. Such long-distance lending is necessary to fulfill the paramount objective of the GSL program: to encourage lenders to make funds available to students around the country to attend schools of their choice. *See Morgan v. Markerdown Corporation*, 976 F. Supp. 301, 308-09 (D.N.J. 1997). To impose liability under state agency law on the Nonschool Defendants for participating under the terms of this program would clearly stand as an obstacle to the accomplishment and execution of the full purposes of Congress. The court below properly found that the Petitioners' agency claims are preempted.

B. The Holding of the Eleventh Circuit is Not in Conflict with the Prior Decisions of this Court.

The Petition in the present case asserts that the decision of the Eleventh Circuit was based on a finding that the relationship between the lenders and the School was merely "permitted" under the GSLP. In making this assertion, Petitioners suggest that conflict preemption occurs only where the state-law prohibition contravenes an express federal mandate. This suggestion in the Petition is inconsistent with the holdings of this Court.

State law, to be preempted, need not run afoul of an express federal mandate. A conflict does not evaporate because a regulation merely permits, but does not compel, the activity in question. Federal and state law may be in "irreconcilable conflict" even when they do not impose directly conflicting duties, where the state statute prohibits conduct authorized by the federal statute. *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 31 (1996) ("irreconcilable conflict" between federal statute that authorized banks to sell insurance and state statute that prohibited it); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). By limiting the availability of an option the federal government considers available under one of its programs, a state creates "an obstacle to the accomplishment and execution of the full purposes and objectives" of the program at issue. *Fidelity Federal Savings and Loan*, 458 U.S. at 155, 156. To the extent that the court below held that state law is preempted because it prohibited conduct that was permitted under the HEA, it is completely consistent with the holdings of this Court.

Furthermore, the holding of the court below was not based only on the fact that the close relationship between the schools and the lenders was merely *permitted*. The Court found that the extensive regulations governing the student loan program expressly authorized the actions that created the alleged agency liability and that state agency law thus stood as an obstacle to the federal program:

> A majority of courts addressing the issue have determined that federal law preempts state law defenses to student loan enforcement which impose liability based on a relationship between schools and lenders mandated or contemplated by the HEA. The borrowers' claims under the Georgia law of agency seek to do just that – impose liability on the non-school defendants based on a relationship between the school and the lenders expressly contemplated, if not mandated, by the HEA. The lenders [sic] assert that the school acted as an agent of the lenders by exercising lender functions in procuring loans for the borrowers. Yet the GSLP expressly permits lenders to delegate lender functions to schools with which they enter into "origination relationships." *See* 34 C.F.R. §§ 682.200; 682.206(a)(b) (1998). *Allowing the borrowers' claims would penalize lenders for participating in the GSLP program according to its express terms*. This would tend to discourage participation of lenders and guaranty agencies in the program. *Cf. Jackson*, 788 F. Supp. at 1247 ("[A] state law claim cannot lie to the extent it would penalize participants in the GSL[P]...for following Congressional directives.") Therefore, the Georgia law of agency and any other applicable state laws "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of

> Congress," *California Federal Savings and Loan Ass'n. v. Guerra*, 479 U.S. 272, 281 (1987), to the extent that they impose liability on the non-school defendants based on the school's exercise of lending functions.

Petitioners' App. 7a – 8a (footnotes omitted; emphasis supplied).

The holding of the Court of Appeals was thus based on two separate conflict-preemption findings: (1) the Court found that the state-law "agency" theory of vicarious liability stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress; and (2) the Court found that the state-law "agency" theory of vicarious liability would penalize lenders for participating in the GSL program according to its express terms. Each of these findings was supported by the previous rulings of this Court and by the record before the Court of Appeals.

III. The Petition Misleadingly Asserts That The Disposition Of This Case Will Impact Current GSLP Borrowers And Mischaracterizes The Disposition Of The "Origination" Theory Of Vicarious Liability In The Court Below.

Plaintiffs misleadingly assert that the holding of the Court of Appeals in this case is more sweeping than the holding in *Armstrong v. Accrediting Council for Continuing Education and Training, Inc.*, 168 F.3d 1362 (D.C. Cir. 1999), and that, under the holding in this case, state agency law will continue to be preempted by GSLP regulations. Petition for Certiorari pp. 9-10. This assertion completely ignores the 1993 changes to the GSL program, documented in *Armstrong*, when the Secretary of Education adopted a

"Common Promissory Note" that subjects lenders to claims and defenses that can be raised against the school. 168 F.3d at 1365-1366. Accordingly, unlike the loan contracts at issue here, the Common Promissory Note now used by all lenders expressly authorizes actions like this one.

Petitioners also mischaracterize the holding of the court below on Petitioners' claim based upon the Secretary of Education's policy of forbearing enforcement of school-originated loans. The Court of Appeals correctly noted that the Petitioners had failed to present the dismissal of the their "origination" theory of vicarious liability "as a distinct point of error." Petitioners' Appendix, p. 9a, n.6. Moreover, the Court of Appeals also upheld the District Court's disposition of the "origination" claim, which disposition was based on the fact that the Secretary had never promulgated its "origination-forbearance" policy as a binding administrative rule. Petitioners' App. p. 9a, n.6. *See also Bartels*, 918 F. Supp. at 1569-70. Accordingly, the Court of Appeals' treatment of the "origination" theory of vicarious liability was based on the merits of that theory, rather than upon any preemption argument.

IV. The Decision Below Should Be Affirmed On Numerous Grounds, Some Of Which Were Raised By The Parties But Not Addressed By The Decisions Below, And Some of Which Were Addressed By The Decisions Below And Not Made Part Of The Appeal Or Of This Petition for Certiorari.

The District Court granted the motions to dismiss on some but not all of the grounds that were asserted by the Nonschool Defendants. In turn, the decision of the Court of

Appeals was also based on fewer then all of the grounds asserted in the motions to dismiss.

In reviewing the decisions below, this Court is not limited to the grounds embraced by the lower courts. *See U.S. v. Arthur Young and Co.*, 465 U.S. 805, 814, n.12 (1984) (a prevailing party may urge any ground in support of the judgment, whether or not that ground was relied upon or even considered by the court below); *U.S. v. New York Telephone Co.*, 434 U.S. 159, 166, n.8 (1977); *Dandridge v. Williams*, 397 U.S. 471, 475-76, n.6 (1970). Rather, the decisions below may be upheld on grounds not alleged by any respondent or considered by the courts below. *Mitsubishi International Corp. v. Cardinal Textile Sales, Inc.*, 14 F.3d 1507, 1517 (11th Cir. 1994); *Powers v. United States*, 996 F.2d 1121, 1123-24 (11th Cir. 1993).

GHEAC submits that the courts below reached the correct results for numerous reasons. Some of these reasons were raised by GHEAC below but not addressed by the decisions below, and other reasons were addressed by the decisions below but not appealed to the Court of Appeals or included as grounds for the instant petition. The Petitioners have waived their rights to challenge those determinations which they have failed to appeal or to assert in the present Petition.

The decisions below should be upheld for all of the reasons asserted by GHEAC below including those reasons not addressed by the courts below.[4]

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[4] These "alternative grounds" include the following: that the District Court properly granted the GHEAC Motion to Dismiss the Second Amended Complaint due to the Petitioners' failure to submit a timely response; that the Petitioners have alleged no fraudulent conduct by the Nonschool Defendants; that promises as to future events are not actionable; that most of the fraud claims are barred by the applicable statute of limitations; that the enrollment agreements and the loan agreements were supported by consideration inasmuch as the lenders parted with their funds and inasmuch as the plaintiffs attended classes; that the Petitioners had failed to establish the conditions for rescission; that the allegations of the agency relationship did not support holding the Nonschool Defendants responsible for the conduct of the School under state law; that the Petitioners failed to appeal the dismissal of Count 3 of the Complaint; that the Petitioners failed to satisfy the conditions for making the Holder Rule claim under state law; that the implication of a duty under state law cannot operate to create obligations which do not arise under the Holder Rule itself; that the Holder Rule does not apply to pre-1992 student loan agreements; that the Holder Rule by its terms does not impose a duty upon the Guarantor; and that the Holder Rule is not violated, and it creates no basis for liability, under any theory, where prescribed notice is absent from the contract.

CONCLUSION

For all of the foregoing reasons, the present Petition for Certiorari should be denied.

Respectfully submitted,

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APPENDIX

§ 1078. Federal payments to reduce student interest costs

(a) Federal interest subsidies

* * *

(2) Additional requirements to receive subsidy

(A) Each student qualifying for a portion of an interest payment under paragraph (1) shall --

(i) have provided to the lender a statement from the eligible institution, at which the student has been accepted for enrollment, or at which the student is in attendance, which –

(I) sets forth the loan amount for which the student shows financial need; and

(II) sets forth a schedule for disbursement of the proceeds of the loan in installments, consistent with the requirements of section 1078-7 of this title; and

(III) Repealed. Pub.L. 105-244, Title IV, § 417(a)(1)(A), Oct. 7, 1998, 112 Stat. 1682

(ii) meet the requirements of subparagraph (B); and

(iii) have provided to the lender at the time of application for a loan made, insured, or guaranteed under this part, the student's driver's number, if any.

(B) For the purpose of clause (ii) of subparagraph (A), a student shall qualify for a portion of an interest payment under paragraph (1) if the eligible institution has determined

and documented the student's amount of need for a loan based on the student's estimated cost of attendance, estimated financial assistance, and, for the purpose of an interest payment pursuant to this section, expected family contribution (as determined under part E of this subchapter [20 U.S.C.A. § 1087kk et seq.]), subject to the provisions of subparagraph (D).

(C) For the purpose of subparagraph (B) and this paragraph –

(i) a student's cost of attendance shall be determined under section 1087ll of this title;

(ii) a student's estimated financial assistance means, for the period for which the loan is sought—

(I) the amount of assistance such student will receive under subpart 1 of part A of this subchapter [20 U.S.C.A. § 1070a et seq.] (as determined in accordance with section 1091(b) of this title), subpart 3 of part A of this subchapter [20 U.S.C.A. § 1070b et seq.], and part C of subchapter I of chapter 34 of Title 42 [42 U.S.C.A. § 2751 et seq.] and part D of this subchapter [20 U.S.C.A. § 1087aa et seq.];

(II) any veterans' education benefits paid because of enrollment in a post secondary education institution, including veterans' education benefits (as defined in section 1087vv(c) of this title, but excluding benefits described in paragraph (2)(E) of such section); plus

(III) other scholarship, grant, or loan assistance, but excluding any national service education award or post-

service benefit under title I of the National and Community Service Act of 1990 [42 U.S.C.A. § 12511 et seq.]; and

(iii) the determination of need and of the amount of a loan by an eligible institution under subparagraph (B) with respect to a student shall be calculated in accordance with part E of this subchapter [20 U.S.C.A. § 1087kk et seq.].

(D) An eligible institution may not, in carrying out the provisions of subparagraphs (A) and (B) of this paragraph , provide a statement which certifies the eligibility of any student to receive any loan under this part in excess of the maximum amount applicable to such loan.

(E) For the purpose of subparagraphs (B) and (C) of this paragraph, any loan obtained by a student under section 1078-1 or 1078-8 of this title or a parent under section 1078-2 of this title or under any State-sponsored or private loan program for an academic year for which the determination is made may be used to offset the expected family contribution of the student for that year.

* * *

(b) Insurance program agreements to qualify loans for interest subsidies

(1) Requirements of insurance program

Any State or any nonprofit private institution or organization may enter into an agreement with the Secretary for the purpose of entitling students who receive loans which are insured under a student loan insurance program of that State, institution, or organization to have made on their behalf the

payments provided for in subsection (a) of this section if the Secretary determines that the student loan insurance program –

* * *

(N) provides that funds borrowed by a student—

(i) are disbursed to the institution by check or other means that is payable to, and requires the endorsement or other certification by, such student; or

(ii) in the case of a student who is studying outside the United States in a program of study abroad that is approved for credit by the home institution at which such student is enrolled or at an eligible foreign institution, are, at the request of the student, disbursed directly to the student by the means described in clause (i), unless such student requests that the check be endorsed, or the funds transfer authorized, pursuant to an authorized power-of-attorney;

* * *

(P) requires the borrower to notify the institution concerning any change in local address during enrollment and requires the borrower and the institution at which the borrower is in attendance promptly to notify the holder of the loan, directly or through the guaranty agency, concerning (i) any change of permanent address, (ii) when the student ceases to be enrolled on at least a half-time basis, and (iii) any other change in status, when such change in status affects the student's eligibility for the loan;

§ 1092. Institutional and financial assistance information for students

(a) Information dissemination activities

(1) Each eligible institution participating in any program under this subchapter and part C of subchapter I of chapter 34 of Title 42 shall carry out information dissemination activities for prospective and enrolled students (including those attending or planning to attend less than full time) regarding the institution and all financial assistance under this subchapter and part C of subchapter I of chapter 34 of Title 42. The information required by this section shall be produced and be made readily available upon request, through appropriate publications, mailings, and electronic media, to an enrolled student and to any prospective student. Each eligible institution shall, on an annual basis, provide to all enrolled students a list of the information that is required to be provided by institutions to students by this section and section 444 of the General Education Provisions Act (also referred to as the Family Educational Rights and Privacy Act of 1974), together with a statement of the procedures required to obtain such information. The information required by this section shall accurately describe –

(A) the student financial assistance programs available to students who enroll at such institution;

(B) the methods by which such assistance is distributed among student recipients who enroll at such institution;

(C) any means, including forms, by which application for student financial assistance is made and requirements for accurately preparing such application;

(D) the rights and responsibilities of students receiving financial assistance under this subchapter and part C of subchapter I of chapter 34 of Title 42;

(E) the cost of attending the institution, including (i) tuition and fees, (ii) books and supplies, (iii) estimates of typical student room and board costs or typical commuting costs, and (iv) any additional cost of the program in which the student is enrolled or expresses a specific interest;

(F) a statement of -

(i) the requirements of any refund policy with which the institution is required to comply;

(ii) the requirements under section 1091b of this title for the return of grant or loan assistance provided under this subchapter [20 U.S.C.A. § 1070 et seq.] and part C of subchapter I of chapter 34 of Title 42 [42 U.S.C.A. § 2751 et seq.]; and

(iii) the requirements for officially withdrawing from the institution;

(G) the academic program of the institution, including (i) the current degree programs and other educational and training programs, (ii) the instructional, laboratory, and other physical plant facilities which relate to the academic program, and (iii) the faculty and other instructional personnel;

(H) each person designated under subsection (c) of this section, and the methods by which and locations in which any person so designated may be contacted by students and

prospective students who are seeking information required by this subsection;

(I) special facilities and services available to handicapped students;

(J) the names of associations, agencies or governmental bodies which accredit, approve, or license the institution and its programs, and the procedures under which any current or prospective student may obtain or review upon request a copy of the documents describing the institution's accreditation, approval, or licensing;

(K) the standards which the student must maintain in order to be considered to be making satisfactory progress, pursuant to section 1091(a)(2) of this title;

(L) the completion or graduation rate of certificate- or degree-seeking, full-time, undergraduate students entering such institutions;

(M) the terms and conditions under which students receiving guaranteed student loans under part B of this subchapter or direct student loans under part D of this subchapter, or both, may –

(i) obtain deferral of the repayment of the principal and interest for service under the Peace Corps Act (as established by the Peace Corps Act (22 U.S.C. 2501 et seq.)) or under the Domestic Volunteer Service Act of 1973 (42 U.S.C. 4951 et seq.), or for comparable full-time service as a volunteer for a tax-exempt organization of demonstrated effectiveness in the field of community service, and

(ii) obtain partial cancellation of the student loan for service under the Peace Corps Act (as established by the Peace Corps Act (22 U.S.C. § 2501 et seq.)) under the Domestic Volunteer Service Act of 1973 (42 U.S.C. 4951 et seq.), or , for comparable full-time service as a volunteer for a tax-exempt organization of demonstrated effectiveness in the field of community service;

(N) that enrollment in a program of study abroad approved for credit by the home institution may be considered enrollment in the home institution for purposes of applying for Federal student financial assistance; and

(O) the campus crime report prepared by the institution pursuant to subsection (f), including all required reporting categories.

(2) For the purpose of this section, the term "prospective student" means any individual who has contacted an eligible institution requesting information concerning admission to that institution.

(3) In calculating the completion or graduation rate under subparagraph (L) of paragraph (1) of this subsection or under subsection (e) of this section, a student shall be counted as a completion or graduation if, within 150 percent of the normal time for completion of or graduation from the program, the student has completed or graduated from the program, or enrolled in any program of an eligible institution for which the prior program provides substantial preparation. The information required to be disclosed under such subparagraph –

(A) shall be made available by July 1 each year to enrolled students and prospective students prior to the students enrolling or entering into any financial obligation; and

(B) shall cover the one-year period ending on August 31 of the preceding year.

(4) For purposes of this section, institutions may exclude from the information disclosed in accordance with subparagraph (L) of paragraph (1) the completion or graduation rates of students who leave school to serve in the armed services, on official church missions, or with a recognized foreign aid service of the Federal Government.

(5) The Secretary shall permit any institution of higher education that is a member of an athletic association or athletic conference that has voluntarily published completion or graduation rate data or has agreed to publish data that, in the opinion of the Secretary, is substantially comparable to the information required under this subsection, to use such data to satisfy the requirements of this subsection.

(6) Each institution may provide supplemental information to enrolled and prospective students showing the completion or graduation rate for students described in paragraph (4) or for students transferring into the institution or information showing the rate at which students transfer out of the institution.

(b) Exit counseling for borrowers

(1)(A) Each eligible institution shall, through financial aid officers or otherwise, make available counseling to

borrowers of loans which are made, insured, or guaranteed under part B (other than loans made pursuant to section 1078-2 of this title) of this subchapter or made under part C or D of this subchapter prior to the completion of the course of study for which the borrower enrolled at the institution or at the time of departure from such institution. The counseling required by this subsection shall include –

(i) the average anticipated monthly repayments, a review of the repayment options available, and such debt and management strategies as the institution determines are designed to facilitate the repayment of such indebtedness; and

(ii) the terms and conditions under which the student may obtain partial cancellation or defer repayment of the principal and interest pursuant to sections 1078(b), 1087dd(c)(2), and 1087ee of this title.

(B) In the case of the borrower who leaves an institution without the prior knowledge of the institution, the institution shall attempt to provide the information described in subparagraph (A) to the student in writing.

(2)(A) Each eligible institution shall require that the borrower of a loan made under part B, C, or D of this subchapter submit to the institution, during the exit interview required by this subsection—

(i) the borrower's expected permanent address after leaving the institution (regardless of the reason for leaving);

(ii) the name and address of the borrower's expected employer after leaving the institution;

(iii) the address of the borrower's next of kin; and

(iv) any corrections in the institution's records relating the borrower's name, address, social security number, references, and driver's license number.

(B) The institution shall, within 60 days after the interview, forward any corrected or completed information received from the borrower to the guaranty agency indicated on the borrower's student aid records.

(C) Nothing in this subsection shall be construed to prohibit an institution of higher education from utilizing electronic means to provide personalized exit counseling.

§ 1094. Program participation agreements

(a) Required for programs of assistance; contents

In order to be an eligible institution for the purposes of any program authorized under this subchapter [20 U.S.C.A. § 1070 et seq.] and part C of subchapter I of chapter 34 of Title 42 [42 U.S.C.A. § 2751 et seq.], an institution must be an institution of higher education or an eligible institution (as that term is defined for the purpose of that program) and shall, except with respect to a program under subpart 4 of part A of t his subchapter [20 U.S.C.A. § 1070c et seq.], enter into a program participation agreement with the Secretary. The agreement shall condition the initial and continuing eligibility of an institution to participate in a program upon compliance with the following requirements:

(9) In the case of an institution participating in a program under part B or C of this subchapter, the institution will

inform all eligible borrowers enrolled in the institution about the availability and eligibility of such borrowers for State grant assistance from the State in which the institution is located, and will inform such borrowers from another State of the source for further information concerning such assistance from that State.

§ 668.41 Reporting and disclosure of information.

(a) Each institution participating in any Title IV, HEA program shall disseminate to all enrolled students, and to prospective students upon request, through appropriate publications and mailing, information concerning –

(1) The institution (see § 668.44); and

(2) Any student financial assistance available to students enrolled in the institution see § 668.43).

(3) The institution's completion or graduation rate and its transfer-out rate, produced in accordance with § 668.46.

§ 668.43 Financial assistance information.

(a)(1) Information on financial. assistance that the institution must publish and make readily available to current and prospective student's under this subpart includes, but is not limited to, a description of all the Federal, State, local, private, and institutional student financial assistance programs available to students who enroll at that institution.

(2) These programs include both need-based and non-need-based programs.

(3) The institution may describe its own financial assistance programs by listing them in general categories.

(b) For each program referred to in paragraph (a) of this section, the information provided by the institution must describe –

(1) The procedures and forms by which students apply for assistance;

(2) The student eligibility requirements;

(3) The criteria for selecting recipients from the group of eligible applicants; and

(4) The criteria for determining the amount of a student's award.

(c) The institution shall describe the rights and responsibilities of students receiving financial assistance and, specifically, assistance under the title IV, HEA programs.

This description must include specific information regarding—

(1) Criteria for continued student eligibility under each program;

(2)(i) Standards which the student must maintain in order to be considered to be making satisfactory progress in his or her course of study for the purpose of receiving financial assistance; and

(ii) Criteria by which the student who has failed to maintain satisfactory progress may re-establish his or her eligibility for financial assistance;

(3) The method by which financial assistance disbursements will be made to the students and the frequency of those disbursements;

(4) The terms of any loan received by a student as part of the student's financial assistance package, a sample loan repayment schedule for sample loans and the necessity for repaying loans;

(5) The general conditions and terms applicable to any employment provided to a student as part of the student's financial assistance package; and

(6) The institution shall provide and collect exit counseling information as required by 34 CFR 674.42 for borrowers under the Federal Perkins Loan Program, by 34 CFR 685.304 for borrowers under the William D. Ford Federal Direct Loan Program, and by 34 CFR 682.604 for borrowers under the Federal Stafford Loan Program.

§ 682.207 Due diligence in disbursing a loan.

(b)(1) In disbursing a loan, a lender—

(v) Shall disburse—

(A) Except as provided in paragraph (b)(1)(v)(C)(1) and (D) of this section, directly to the school;

(B) In the case of a Federal PLUS loan—

(1) By electronic funds transfer or master check from the lender in accordance with the disbursement schedule provided by the school to a account maintained in accordance with § 668.163 by the school as trustee for the lender. A disbursement made by electronic funds transfer or master check must be accompanied by a list of the names, social security numbers, and loan amounts of the borrowers who are receiving a portion of the disbursement and the names and social security numbers of the students on whose behalf the parents are borrowing.

(2) By a check from the lender that is made co-payable to the institution and the parent borrower directly to the institution of higher education.

(3) In the case of a student enrolled in a foreign institution, a check from the lender that is made co-payable to the institution and sent directly to either the parent or the eligible institution.

(C) In the case of a student enrolled in a study-abroad program approved for credit at the home institution in which the student is enrolled, if the student requests –

(1) Directly to the student; or

(2) To the home institution if the borrower provides a power-of-attorney to an individual not affiliated with the institution to endorse the check or complete an electronic funds transfer authorization.

(D) In the case of a student enrolled in an eligible foreign school, if the student requests—

(1) Directly to the student; or

(2) To the institution if the borrower provides a power-of-attorney to an individual not affiliated with the institution to endorse the check or complete an electronic funds transfer authorization.

(vi) Except as provided in paragraph (d)(2) of this section, may not disburse a second or subsequent disbursement on a Stafford or SLS loan to a student who has ceased to be enrolled.

(2) Except as provided in paragraph (b)(1)(v)(C)(2) of this section, neither a lender nor a school may obtain a borrower's power of attorney or other authorization to endorse or otherwise approve the cashing of a loan check or the release of funds disbursed by electronic funds transfer, nor may a borrower provide this power of attorney or authorization to anyone else. However, the school may present the loan check to a financial institution for deposit in an account of the borrower pursuant to the borrower's written authorization under paragraph (b)(1)(ii)(A) of this section.

§ 682.603 Certification by a participating school in connection with a loan application.

(a) A school shall certify that the information it provides in connection with a loan application about the borrower and, in the case of a parent borrower, the student for whom the loan is intended, is complete and accurate. Except as provided in 34 CFR part 668, subpart E, a school may rely in good faith upon statements made on the application by the student.

(b) The information to be provided by the school about the borrower making application for the loan pertains to—

(1) The borrower's eligibility for a loan, as determined in accordance with § 682.201 and § 682.401(b) (1) and (2);

(2) The student's estimated cost of attendance for the period for which the loan is sought;

(3) The student's estimated financial assistance for the period for which the loan is sought;

(4) For a Stafford loan, the student's eligibility for interest benefits, based on information provided by the student upon which the school can rely and as determined in accordance with § 682.301; and

(5) The schedule for disbursement of the loan proceeds, which must reflect the delivery of the loan proceeds as set forth in § 682.604(c)(6).

(c) [Reserved]

(d) A school may not certify a Stafford or PLUS, loan application, or combination of loan applications, for a loan amount that—

(1) The school has reason to know would result in the borrower exceeding the annual or maximum loan amounts in § 682.204; or

(2) Exceeds the student's estimated cost of attendance, less—

(i) The student's estimated financial assistance for that period; and

(ii) In the case of a Stafford loan that is eligible for interest benefits, the borrower's expected family contribution for that period.

(e) A school may refuse to certify a Stafford or PLUS loan application or may reduce the borrower's determination of need for the loan if the reason for that action is documented and provided to the student in writing, provided—

(1) The determination is made on a case-by-case basis;

(2) The documentation supporting the determination is retained in the student's file; and

(3) The school does not engage in any pattern or practice that results in a denial of a borrower's access to FFEL loans because of the borrower's race, sex, color, religion, national origin, age, handicapped status, income, or selection of a particular lender or guaranty agency.

§ 682.604 Processing the borrower's loan proceeds and counseling borrowers.

(c) Processing of the loan proceeds by the school.

(1) Except as provided in paragraph (c)(3) of this section, if a school receives a borrower's loan proceeds, it shall hold the funds until the student has registered for classes for the period of enrollment for which the loan is intended and then follow the procedures in paragraph (c)(2) of this section.

(2)(i) Except as provided in § 682.207(b)(1)(v)(C)(1) and (D)(1), after the student has registered, if the loan proceeds are disbursed by means of a check that requires the endorsement of the student only, the school shall deliver the check to the student, subject to paragraph (d)(2) of this section, within 30 days of the school's receipt of the check.

(ii) If the loan proceeds are disbursed by means of a check that requires the endorsement of both the borrower and the school, the school shall—

(A) In the case of the initial disbursement on a loan, endorse the check on its own behalf, and, after the student has registered, deliver it to the student subject to paragraph (d)(2) of this section, within 30 days of the school's receipt of the check; or

(B) Obtain the borrower's endorsement on the check, endorse the check on its own behalf and, after the student has registered, credit the student's account, in accordance with paragraph (d)(1) of this section, and deliver the remaining loan proceeds to the student, as specified in § 668.164(e).

(3) If the loan proceeds are disbursed by electronic funds transfer to an account of the school in accordance with § 682.207(b)(1)(ii)(B), or by master check in accordance with § 682.207(b)(1)(ii)(C), the school must, unless authorization was provided in the loan application, obtain the student's, or in the case of a PLUS loan, the parent borrower's written authorization for the release of the initial and any subsequent disbursement of each FFEL loan to be made, and after the student has registered either—

(i) Deliver the proceeds to the student or parent borrower as specified in § 668.164; or

(ii) Credit the student's account in accordance with paragraph (d)(1) of this section and § 668.164, notify the student or parent borrower in writing that it has so credited that account, and deliver to the student or parent borrower the remaining loan proceeds not later than the timeframe specified in 668.164.

(4) A school may not credit a student's account or release the proceeds of a loan to a student who is on a leave of absence, as described in § 668.22(j).

(5) A school may not release the first installment of a Stafford or SLS loan for endorsement to a student who is enrolled in the first year of an undergraduate program of study and who has not previously received a Stafford or SLS loan until 30 days after the first day of the student's program of study.

(6) Notwithstanding any other provision of this section, unless § 682.207(c)(4) or (5) applies—

(i) If a loan period is more than one payment period, the school shall deliver loan proceeds at least once in each payment period; and

(ii) If a loan period is one payment period, the school shall make at least two deliveries of loan proceeds during that payment period. The school may not make the second delivery until the calendar midpoint between the first and last scheduled days of class of the loan period.

(7) If an educational. program measures academic progress in credit hours and does not used semesters, trimesters, or quarters, the school may not deliver a second disbursement until the later of—

(i) The calendar midpoint between the first and last scheduled days of class of the loan period; or

(ii) The date, as determined by the school, that the student has completed half of the academic coursework in the loan period.

(8) If an educational program measures academic progress in clock hours, the school may not deliver a second disbursement until the later of—

(i) The calendar midpoint between the first and last scheduled days of class of the loan period; or

(ii) The date, as determined by the school, that the student has completed half of the clock hours in the loan period.

(9) The school must deliver loan proceeds in substantially equal installments, and no installment may exceed one-half of the loan.

(g) Exit Counseling.

(1) A school shall conduct in-person exit counseling with each Stafford of SLS borrower shortly before the borrower ceases at least half-time study at the school, except that –

(i) In the case of a student enrolled in a correspondence course, the school shall provide the borrower with written

counseling materials within 30 days after the borrower completes the program; and

(ii) If the borrower withdraws from school without the school's prior knowledge or fails to attend an exit counseling session as scheduled, the school shall mail written counseling material to the borrower at the borrower's last known address within 30 days after learning that the borrower has withdrawn from school or failed to attend the scheduled session.

(2) In conducting the exit counseling, the school shall—

(i) Inform the student of the average anticipated monthly repayment amount based on the student's indebtedness or on the average indebtedness of students who have obtained Stafford of SLS loans for attendance at that school or in the borrower's program of study.

(ii) Review for the borrower available repayment options (e.g., loan consolidation, refinancing);

(iii) Suggest to the borrower debt-management strategies that the school determines would best assist repayment by the borrower;

(iv) Include the matters described in paragraph (f)(2) of this section;

(v) Review with the borrower the conditions under which the borrower may defer repayment or obtain partial cancellation of a loan; and

(vi) Require the borrower to provide corrections to the institution's records concerning name, address, social security number, references, and driver' license number, as well as the borrower's expected permanent address, the address of the borrower's next of kin, and the name and address of the borrower's expected employer that will then be provided within 60 days to the guaranty agency or agencies listed in the borrower's records.

(3) Additional matters that the Secretary recommends that a school include in the exit counseling session or materials are set forth in appendix D to 34 CFR part 668.

(4) The school shall maintain in the student borrower's file documents substantiating the school's compliance with paragraphs (f)-(g) of this section as to that borrower.

(h) Treatment of excess loan proceeds. Except as provided under paragraph (i) of this section, or in the case of a student attending a foreign school, if, before the delivery of any Stafford or SLS loan disbursement, the school learns that the borrower will receive or has received financial aid for the period of enrollment for which the loan was made that exceeds the amount of assistance for which the student is eligible, the school shall reduce or eliminate the overaward by either—

(1) Using the student's SLS, PLUS, nonsubsidized or unsubsidized Stafford, or State-sponsored or private loan to cover the expected family contribution, if not already done;

(2)(i) Returning the entire undelivered disbursement to the lender or escrow agent; and

(ii) Providing the lender with a written statement—

(A) Describing the reason for the return of the funds, if any;

(B) Setting forth the student's revised financial need; and

(C) Directing the lender to re-disburse a revised amount and, if necessary, revise subsequent disbursements to eliminate the overaward; or

(3) Returning to the lender any portion of the disbursement for which the student is ineligible and providing the lender with a written statement explaining the return of the funds.

(i) For purposes of paragraph (h) of this section, funds obtained from any Federal College Work-Study employment that do not exceed the borrower's financial need by more than $300 may not be considered as excess loan proceeds.